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Where's Einstein When You Need Him? Assessing The Role Of Relative Qualifications In A Plaintiff's Case Of Failure-to-promote Under Title VII

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COMMENT

Where's Einstein When You Need Him? Assessing the Role of Relative Qualifications in a Plaintiff's Case of Failure-to-Promote Under Title VII

Perhaps nothing in the large, judicially created body of law that fleshed out Title VII's antidiscrimination mandates has been more of a double-edged sword to victims of discrimination than the Supreme Court's loose adaptation of the "prima facie case" concept as the framework for organizing proof in Title VII cases.[1]

I. INTRODUCTION

The reference to Einstein in the title of this comment appropriately acknowledges the great mind who first articulated the concept of relativity—the notion of measuring one thing in light of another. Einstein eloquently explained, "When you sit with a nice girl for two hours, you think it's only a minute. But when you sit on a hot stove for a minute, you think it's two hours. That's relativity."[2] The concept of relativity plays an important role in cases of promotion discrimination in the workplace, as the plaintiff denied promotion and the defendant-employer both may wish to point to the relative qualifications of the person(s) actually promoted in order to carry the day. As a thorough reading of this comment will make clear, assessing the proper role of relative qualifications in the failure-to-promote context is not necessarily a routine task susceptible to a ready-made solution. Needless to say, in undertaking this task, having Einstein on hand might prove extremely helpful. Fortunately, however, based upon Supreme Court precedent, the question at the center of this comment—whether a failure-to-promote plaintiff should be required to establish that she is relatively more qualified than the promoted employee—is quite answerable, even absent Einstein's assistance. As I shall argue, simply put, the answer to that

1. Jeffery A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 74 (2003).

2. THE HARPER BOOK OF QUOTATIONS 443 (Robert I. Fitzhenry ed., 3rd ed. 1993).

question is "no," although relative qualifications can and should be utilized by plaintiffs and defendants alike in the proper case.

In this comment, my argument is cast through an intra-circuit split in the case law of the Eleventh Circuit Court of Appeals. In the context of failure-to-promote cases, the Eleventh Circuit has revealed a certain bipolar tendency by only sometimes requiring a plaintiff to prove herself relatively more qualified than the employee actually promoted. Such a split in the case law presents a unique opportunity to determine what the prevailing rule ought to be in the Eleventh Circuit, and, more importantly, in failure-to-promote cases generally.

II. TITLE VII AND THE *McDONNELL DOUGLAS* FRAMEWORK

Title VII of the Civil Rights Act of 1964 prohibits, in the context of employment, an employer from discriminating against an individual on account of race, color, religion, sex, or national origin.[3] In some cases of intentional disparate treatment, the plaintiff will be able to present direct evidence of discrimination. (For example, where an employer says to the plaintiff, "I'm firing you because you are *x* and I hate all people of the *x* race," direct evidence of discrimination exists.) In the vast majority of cases, however, the plaintiff will have to present circumstantial evidence to create an inference (or presumption)[4] of intentional discrimination that the fact-finder is then free to believe or disbelieve. In *McDonnell Douglas Corp. v. Green*,[5] the Supreme Court laid out the now familiar burden-shifting framework for a circumstantial evidence case. First, the plaintiff must make a prima facie showing of discrimination. This may be done by demonstrating (1) that she is a member of a protected class, (2) that she applied and was qualified for a

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3. 42 U.S.C. § 2000e-2 provides that:

> (a) Employer practices—It shall be an unlawful employment practice for an employer–
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2000) (emphasis added).

4. See *Walker v. Mortham*, 158 F.3d 1177, 1183-84 n.10 (11th Cir. 1998), for an interesting discussion of whether the plaintiff's prima facie case establishes an inference or a presumption of discrimination. The *Walker* majority concluded that the prima facie case establishes a presumption. *Id.* The *Walker* concurrence, however, wrote separately to express the view that the prima facie case does, in fact, establish an inference of discrimination. *Id.* at 1197-99.

5. 411 U.S. 792 (1973).

job for which the employer was seeking applicants, (3) that despite her qualifications, she was rejected, and (4) that after her rejection, the position remained open and the employer continued to seek applications from persons of the plaintiff's qualifications.[6] If the plaintiff succeeds in establishing a prima facie case of unlawful discrimination, the burden of *production* (but not *persuasion*) shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection.[7] If the employer remains silent in the face of the plaintiff's prima facie case and the fact-finder believes the plaintiff's evidence, the court *must* enter judgment for the plaintiff because there is no issue of fact remaining in the case.[8] On the other hand, assuming the employer does articulate a legitimate, nondiscriminatory reason, the onus returns to the plaintiff, who is given an opportunity to demonstrate that the employer's proffered reason is not worthy of credence and that the employment action is best explained by unlawful discrimination. At this stage, the burden to show pretext merges with the plaintiff's ultimate burden of persuasion to demonstrate that the employer possessed an unlawful intent to discriminate.[9]

III. THE ELEVENTH CIRCUIT SPLIT

A. *Problem: Dueling Standards*

Title VII applies to all facets of the employment relationship, including the realm of employee promotion.[10] The Supreme Court has noted that the elements of the prima facie case described in *McDonnell Douglas* are "not necessarily applicable in every respect to differing factual situations."[11] Thus, courts have attempted to tailor the framework to various types of cases, such as, for example, cases alleging promotion discrimination. In failure-to-promote cases, the Eleventh Circuit Court of Appeals has inconsistently defined what a plaintiff must show in order to establish a prima facie case. In one line of cases, the court has required the plaintiff to demonstrate (1) that she belonged to a protected group, (2) that she applied and was qualified for a job for which her

6. *Id.* at 802.

7. *Id.*; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (stating that the ultimate burden of persuading the fact-finder that the defendant intentionally discriminated remains at all times with the plaintiff, and that the defendant's burden to articulate a legitimate, nondiscriminatory reason is merely one of production).

8. *Burdine*, 450 U.S. at 254.

9. *Id.* at 256 ("[Plaintiff's] burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.").

10. *See* 42 U.S.C. § 2000e-2 (2000).

11. *McDonnell Douglas*, 411 U.S. at 802 n.13.

employer was seeking applications, (3) that despite her qualifications, she was rejected for the position, and (4) that after the rejection, her employer kept the position open or filled it with a person not belonging to the plaintiff's protected group.[12] In another line of cases, the court has required the plaintiff to prove an additional fifth element—that other *equally or less qualified* employees not belonging to the protected group were promoted instead.[13] In other words, in the second line of cases, in order for the plaintiff to establish a prima facie case, the Eleventh Circuit has required her to demonstrate that she was, relative to the employee actually promoted, *equally or more qualified.*

The first line of cases dates back to *Crawford v. Western Electric Co.*,[14] a case decided in 1980 when the Eleventh Circuit was part of the Fifth Circuit.[15] *Crawford* was a complicated case in which several African-American employees alleged, inter alia, that the promotion procedures of the defendant-employer, Western Electric, were being applied in a racially discriminatory manner.[16] Western Electric's Jacksonville Installation Division was responsible for installing, modifying, and removing telephone company central office equipment.[17] Under a collective bargaining agreement with the Communication Workers of America, Western Electric paid its installers an hourly wage that corresponded with an assigned skill category called an index.[18] Installers were hired at the lowest skill level, Index 1.[19] In order to obtain promotion to higher index levels, installers were required to perform a certain amount of work associated with a higher index and receive a rating from a supervisor indicating qualification for the higher index level.[20]

The plaintiffs filed suit under both Title VII and 42 U.S.C. § 1981,[21] but the Title VII claims were disposed of on partial summary

12. *See, e.g.*, Crawford v. W. Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980).

13. *See, e.g.*, Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 n.7 (11th Cir. 1983).

14. 614 F.2d 1300.

15. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted all opinions issued by the Fifth Circuit prior to October 1, 1981 as binding precedent. Therefore, the *Crawford* decision is part of the Eleventh Circuit's controlling case law.

16. *Crawford*, 614 F.2d at 1311.

17. *Id.* at 1309.

18. *Id.* at 1310.

19. *Id.* at 1311.

20. *Id.*

21. § 1981 provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

judgment due to failure to comply with administrative pre-requisites.[22] The § 1981 claims proceeded to trial where the plaintiffs testified that certain white installers who had been simultaneously or subsequently hired were more successful in achieving promotions to higher index levels.[23] In addition, the plaintiffs proffered evidence that they had not been assigned work corresponding with the higher index levels, despite having requested such work from their supervisors.[24] The plaintiffs further testified that, during the 1960s, some of their supervisors used racially-motivated language and addressed them as "boys."[25] Finally, the plaintiffs also attacked statistical evidence put forth by Western Electric.[26] As the court summarized:

> Basically, then, plaintiffs sought to prove discrimination both in work assignments and in the index review process. They alleged that they were not given work assignments that would allow them to advance as rapidly as whites to higher indexes and that the subjective nature of both the process by which work assignments are made and the process by which installers are rated "qualified" operated to impede black installers' advancement within the index system.[27]

The district court found in favor of Western Electric, concluding that each plaintiff had not established a prima facie case of racial discrimination under § 1981[28] because they had not produced evidence "to show that they were qualified to do the work that they claim was discriminatorily denied them."[29]

In reviewing the district court's determination as to the § 1981 claims, the *Crawford* court proceeded with the assumption that a prima facie case of race discrimination would be made out only if the plaintiffs

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> . . .
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2000).

22. With respect to the Title VII claims, the *Crawford* court remanded for adjudication, finding that the plaintiffs had not properly received "unequivocal notice" that the Equal Employment Opportunity Commission would not sue Western Electric, and consequently, the plaintiff's Title VII claims were not time barred. *Crawford*, 614 F.2d at 1307. The *Crawford* court's handling of the § 1981 claims is more relevant to this comment, for it is through those claims that the court addresses the requirements of a plaintiff's prima facie case in the failure-to-promote context.

23. *Id.* at 1314.

24. *Id.*

25. *Id.*

26. *Id.* at 1312.

27. *Id.* at 1314-15.

28. Like Title VII claims, allegations of discrimination under § 1981 are analyzed using the *McDonnell Douglas* framework. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (holding that the *McDonnell Douglas/Burdine* scheme of proof should apply in § 1981 cases); *see also* Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

29. *Crawford*, 614 F.2d at 1315.

could establish each element of the *McDonnell Douglas* test.[30] As noted above, the district court concluded that the plaintiffs had not demonstrated that they were "qualified" for promotion, presumably meaning that the plaintiffs had not satisfied the second element of the prima facie case. The *Crawford* court disagreed with that determination: "Establishing qualifications is an employer's prerogative, but an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process, for example, is challenged as discriminatory."[31] The plaintiffs had demonstrated during trial that Western Electric's index review system was highly dependent on subjective elements.[32] Thus, the court concluded, all plaintiffs who sought promotion to a higher index level proved themselves qualified with respect to the second element of the prima facie case.[33] Additionally, the court found that all but two of the plaintiffs had satisfied the remainder of the *McDonnell Douglas* elements by proffering credible evidence of racial conduct by Western Electric, as well as statistically demonstrating a significant disparity in the rate of advancement of African American installers as compared to whites.[34] Therefore, according to the court, all but two of the plaintiffs succeeded in raising an inference that work in higher index levels was discriminatorily given to white employees.[35]

The court then turned to the question of whether Western Electric had successfully rebutted each plaintiff's prima facie case. While concluding that the district court had given improper weight to some of the evidence proffered in the rebuttal stage, the *Crawford* court found that Western Electric's evidence proving that economic factors played a significant role in reducing available work, coupled with the fact that supervisors had been instructed to assign work in a race-neutral manner, would suffice to rebut a prima facie case.[36] The case was remanded, however, for the district court, sitting in its fact-finding capacity, to determine whether Western Electric's proffered legitimate, nondiscriminatory reasons were sufficient to rebut each prima facie case by the

30. *Id.* In order to satisfy the test, the plaintiffs were required to show (1) that they belonged to a protected group, (2) that they sought and were qualified for positions that Western Electric was attempting to fill, (3) that despite their qualifications they were rejected, and (4) that after their rejection Western Electric either continued to attempt to fill the positions or in fact filled the positions with whites. *Id.*

31. *Id.* (citation omitted).

32. *Id.* at 1316.

33. *Id.* at 1317.

34. *Id.* at 1318.

35. *Id.* at 1320.

36. *Id.* at 1319.

applicable standard—i.e., a preponderance of the evidence.[37]

While the outcome of the *Crawford* case is not particularly significant for purposes of this comment, the court's articulation of the elements that a plaintiff must satisfy in order to establish a prima facie case of promotion discrimination is centrally important. The *Crawford* court implicitly found that the elements as articulated in *McDonnell Douglas* were applicable in the failure-to-promote context.

The requirement of relative qualifications was not imposed in the Eleventh Circuit until 1983, when *Perryman v. Johnson Products Co.*[38] became the first case of the second, divergent line. In that case, the plaintiffs filed a class action under Title VII against Johnson Products, a cosmetics manufacturer and distributor, alleging both individual acts of sex discrimination in hiring, promotion, and termination, as well as a pattern or practice of discrimination affecting the plaintiff class.[39] The district court found, *inter alia*, that the plaintiffs had successfully shown a pattern or practice of intentional discrimination on account of sex.[40] The district court also found that Johnson Products had not proffered any legitimate, nondiscriminatory reasons for its actions and, therefore, judgment was entered for the plaintiffs.[41]

In reviewing the district court's findings, the *Perryman* court was not asked to address whether the plaintiffs had successfully established a prima facie case of unlawful discrimination. Rather, the primary issue on appeal was whether the defendant, Johnson Products, had satisfied its burden of articulating legitimate, nondiscriminatory reasons for its employment decisions. In this regard, the court concluded that Johnson Products had presented a "vigorous defense" that was sufficient to rebut the plaintiffs' prima facie showing and, as a result, the district court's conclusion to the contrary was clearly erroneous.[42] Therefore, the *Perryman* court remanded the case for consideration of the evidence proffered by Johnson Products and also to provide the plaintiffs with an opportunity to demonstrate pretext.[43]

In reaching its conclusion, the *Perryman* court identified the requirements for establishing a prima facie case of promotion discrimination.[44] Peculiarly, the last of the identified elements required the

37. *Id.* at 1320.

38. 698 F.2d 1138 (11th Cir. 1983).

39. *Id.* at 1140.

40. *Id.* at 1141.

41. *Id.*

42. *Id.* at 1141, 1144.

43. *Id.* at 1145.

44. *Id.* at 1142 n.7. To establish a prima facie case under *Perryman*, a plaintiff must prove that he or she (1) is a member of a protected minority, (2) was qualified for and applied for the

plaintiff to show "that other employees with *equal or lesser qualifications* who were not members of the protected minority were promoted."[45] With that articulation, the *Perryman* court forced the plaintiff to present proof of relative qualifications. In support of that requirement, the court—surprisingly—cited to *Crawford*, as well as a case from the D.C. Circuit Court of Appeals, *Bundy v. Jackson*.[46] However strange the citation to *Bundy* may seem,[47] the *Perryman* court's citation to *Crawford* is even more baffling because, as explained above, *Crawford* did not require the plaintiff to demonstrate relative qualifications at the prima facie case stage. Regardless of the degree of accuracy in its citations, however, the *Perryman* court became the first panel of the Eleventh Circuit to impose such a requirement, and consequently, the decision marked the "birth" of an intra-circuit split.

B. *Resolution: And the Winner Is . . .*

Having identified the intra-circuit split, the next task is to determine which of the two rules is, in fact, the prevailing standard. This assessment is made by asking and answering two questions. First, which standard is prevailing from a legal standpoint? Second, which standard is prevailing in practice? If both questions could be answered with an identical response, the Eleventh Circuit split would be less consequential. Since the prevailing legal standard has not prevailed in practice, however, an interesting tension has emerged in the Circuit's case law.

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promotion, (3) was rejected despite these qualifications, and (4) that other employees with *equal or lesser qualifications* who were not members of the protected minority were promoted. *See id.*

45. *Id.* (emphasis added).

46. 641 F.2d 934 (D.C. Cir. 1981). In *Bundy*, the plaintiff alleged that her rejection of unsolicited sexual advances from several supervisors led those supervisors to delay and block promotions to which she was entitled. *Id.* at 938. The court first identified the general requirements of a prima facie case of promotion discrimination:

> [T]o make out a prima facie case the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied.

Id. at 951. Then, interestingly, the court opted to "relax" the requirements for the plaintiff at hand, stating:

> [W]e are not requiring the plaintiff to show as part of her prima facie case that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the time she was denied a promotion. We relieve the plaintiff of the need to prove such facts because . . . we think her burden should be eased where she can prove not only that she is a member of a disadvantaged group, but also that she has personally suffered illegal discrimination through the harassment itself.

Id. at 953.

47. Given the controlling nature of *Crawford*, a case from within the court's jurisdiction, the citation to *Bundy* is nothing short of odd.

The *Crawford* rule, which does not require the plaintiff to demonstrate relative qualifications, is the legally prevailing standard. In *Walker v. Mortham*,[48] the Eleventh Circuit had occasion to confront the intra-circuit split head-on. In that case, African-American applicants and employees of the state of Florida filed suit under Title VII, alleging that the state had engaged in an unlawful pattern or practice of race discrimination in its employment decisions.[49] Following a non-jury trial on the merits, the district court assumed that each individual plaintiff had established a prima facie case, but nonetheless entered judgment for the state; the district court concluded that the plaintiffs had failed to prove the ultimate fact of intentional discrimination in light of the state's articulated legitimate, nondiscriminatory reasons.[50] On appeal, the case was reversed and remanded because the appellate court found that the state had not articulated any legitimate, nondiscriminatory reasons for its employment decisions.[51] In sum, the appellate court stated that "a court may not assume, based on its own perusal of the record, that the decision-maker in a particular case was motivated by a legitimate reason when the defendant has offered none."[52] Therefore, the appellate court found remand necessary to determine which plaintiffs had actually established prima facie cases so that judgment could be entered in their favor.[53] On remand, the district court concluded that none of the plaintiffs had satisfied the burden of establishing a prima facie case, and again entered judgment for the state.[54] Once again, the plaintiffs appealed, arguing that the district court had applied incorrect legal standards in assessing whether each individual had established a prima facie case.[55] At that point in the litigation, the *Walker* court addressed the requirements necessary to establish a prima facie case of discrimination in both hiring and promotion.

First, the *Walker* court noted the approach used by the district court below. On remand, in order to establish a prima facie case, each plaintiff had been asked to prove (1) that he was a member of a protected class, (2) that he applied for and was qualified for the position in question, (3) that a person not a member of the protected class *with equal or lesser qualifications* received the position, and (4) that the adverse employment action complained of was actually taken against him.[56] The

48. 158 F.3d 1177 (11th Cir. 1998).
49. *Id.* at 1180.
50. *Id.* at 1181.
51. *Id.* at 1181-82.
52. *Id.* at 1181 n.8.
53. *Id.* at 1182.
54. *Id.*
55. *Id.*
56. *Id.* at 1185.

plaintiffs argued that the district court had erred by including the third element, which required proof of relative qualifications.[57] As the *Walker* court observed, the district court did not distinguish between hiring and promotion discrimination; the district court had demanded that all plaintiffs prove identical elements in order to make out a prima facie case. Finding that approach erroneous, the *Walker* court responded: "[W]e appear to have articulated different standards for a prima facie case depending on whether the relevant Title VII claim is classified as a 'failure to hire' or a 'failure to promote' claim."[58] The court then proceeded to address the appropriate elements in the failure-to-promote context, noting the formula articulated in *Crawford*, which does not require proof of relative qualifications.[59] But, the *Walker* court also noted the *Perryman* formula, which, as already stated, *does* require the plaintiff to demonstrate that "'other employees *with equal or lesser qualifications* who were not members of the protected minority were promoted.'"[60]

Confronted with two conflicting rules, the *Walker* court observed: "In deciding which line of precedent to follow, we are, ironically, faced with two conflicting lines of precedent."[61] The first line of precedent holds that when there is intra-circuit conflict, a panel is to determine which line is most consistent with Supreme Court authority or the majority of case law within the circuit.[62] If there are no analogous Supreme Court cases, and the cases within the circuit are somewhat evenly divided, then the panel should use common sense and reason to determine which line of precedent to follow.[63] By contrast, the second line of precedent holds that intra-circuit conflict should be resolved by giving credence to the rule that stems from the earliest case.[64] This second approach acknowledges that a decision of one panel cannot be overturned by a later panel.[65] To overturn a prior panel decision, the circuit is required to conduct a hearing *en banc*, which allows the entire court to consider whether to depart from prior circuit precedent.

Faced with this "fork in the road," the *Walker* court, "in a very

57. *Id.*

58. *Id.*

59. *Id.* at 1186.

60. *Id.* at 1186-87 (quoting Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 n.7 (11th Cir. 1983)).

61. *Id.* at 1188.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

careful and searching opinion,"[66] opted for the earliest-case rule.[67] As the court reasoned, adherence to prior precedent is necessary in order to maintain stability in the law.[68] Moreover, the court stated, adherence to the earliest precedent rule serves to bring intra-circuit splits to "a screeching halt," whereas the common sense and reason rule can result in perpetual splits, as different panels reach varying conclusions as to what is commonsensical and reasonable.[69] Because *Crawford* had been decided prior to *Perryman*, the *Walker* panel held that the prima facie case requirements from *Crawford* should govern within the Eleventh Circuit.[70] Therefore, the *Walker* court held that the district court had erred in requiring each plaintiff to demonstrate equal or superior qualifications relative to the person(s) actually promoted.[71] The court proceeded to examine the record to determine whether each individual plaintiff had produced evidence at trial that, if believed by the district court, would be otherwise sufficient to establish a prima facie case.[72] After identifying several plaintiffs that had produced such evidence, the *Walker* court vacated the district court's judgment and remanded for a credibility assessment.[73] As the court stated, "If the [district] court credits the plaintiffs' evidence establishing the *McDonnell-Douglas* elements of a prima facie case, we direct it to adjudge the defendants liable on that claim, and thereafter to fashion an appropriate remedy."[74]

While the *Crawford* standard may technically be the prevailing precedent, in practice many more courts have adhered to the *Perryman* rule.[75] Since 1998, despite the efforts of the *Walker* court to bring the intra-circuit split to "a screeching halt," the Eleventh Circuit has repeatedly followed the *Perryman* rule requiring plaintiffs to demonstrate relative qualifications in order to establish a prima facie case of promotion discrimination.[76]

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66. Bernstein v. Sephora, 182 F. Supp. 2d 1214, 1221 (S.D. Fla. 2002).
67. *Walker*, 158 F.3d at 1188.
68. *Id.*
69. *Id.* at 1189 n.25.
70. *Id.* at 1189.
71. *Id.* at 1193.
72. *Id.* at 1194-96.
73. *Id.* at 1195.
74. *Id.* at 1197.
75. As one district court stated, "[c]uriously, *Walker* did not settle the issue within the Eleventh Circuit, which has continued to require plaintiffs to show that other candidates for a denied promotion were less or equally qualified, in order to make out a prima facie case under Title VII." Bernstein v. Sephora, 182 F. Supp. 2d 1214, 1221 (S.D. Fla. 2002) (stating further that "the Court is at a loss to explain the reason for this dissonance").
76. *See, e.g.*, Stuart v. Jefferson County Dep't of Human Res., 152 F. App'x 798, 801 (11th Cir. 2005); Hithon v. Tyson Foods, Inc., 144 F. App'x 795, 799 (11th Cir. 2005); Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1154 (11th Cir. 2005) (noting in dicta that, in a Title VII failure to promote case, a plaintiff must demonstrate "that other equally or less qualified

A recent case is illustrative: In *Wilson v. B/E Aerospace, Inc.*,[77] the Eleventh Circuit reversed the district court's grant of summary judgment to the employer.[78] The primary issue of contention was whether the plaintiff had established a prima facie case of promotion discrimination. The district court, applying the *Perryman* standard, concluded that the plaintiff had not made out a prima facie case because she had failed to demonstrate qualifications equal or superior to the person actually promoted.[79] The Eleventh Circuit panel, while agreeing that the plaintiff must demonstrate relative qualifications, reversed because the plaintiff had presented sufficient evidence to create a genuine issue of material fact as to whether she was equally or more qualified than the promoted employee.[80] Thus, in *Wilson*, the issue before the court was directly a result of the application of the *Perryman* relative qualifications requirement.

While *Wilson* appears to represent the trend in the Eleventh Circuit, a few recent panels have followed *Walker*.[81] In "monkey see, monkey do" fashion, the district courts within the Eleventh Circuit have similarly split as to whether a plaintiff must demonstrate relative qualifications in order to establish a prima facie case of promotion discrimination.[82]

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employees who were not members of the protected class were promoted"); Barron v. Fed. Reserve Bank of Atlanta, 129 F. App'x 512, 516-17 (11th Cir. 2005) (noting that "[plaintiff] has not offered any evidence to show that, compared to him, [the promoted employee] was equally or less qualified" in holding that plaintiff failed to establish a prima facie case); Ash v. Tyson Foods, Inc., 129 F. App'x 529, 532 (11th Cir. 2005); Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001); Durley v. APAC, Inc., 236 F.3d 651, 655-56 (11th Cir. 2000); Lee v. GTE Fla., Inc., 226 F.3d 1249, 1253 (11th Cir. 2000); Alexander v. Fulton County, Ga., 207 F.3d 1303, 1339 (11th Cir. 2000); Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999).

77. 376 F.3d 1079 (11th Cir. 2004).

78. *Id.* at 1092.

79. *Id.* at 1089.

80. *Id.*

81. *See* Crawford v. Johnson, 133 F. App'x 674, 675 (11th Cir. 2005) (concluding nonetheless that plaintiff failed to establish a prima facie case); Gamble v. Aramark Unif. Servs., 132 F. App'x 263, 265 (11th Cir. 2005) (citing directly to the *Walker* formulation of a prima facie case); Wallace v. Teledyne Cont'l Motors, 138 F. App'x 139, 143 (11th Cir. 2005) (citing directly to the *Walker* formulation); Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 768 (11th Cir. 2005).

82. *Compare* Wohlhueter v. Cambria Fabshop-Atlanta, Inc., No. Civ.A. 104CV2922JFK, 2005 WL 3359705, at *5 (N.D. Ga. Dec. 9, 2005) (citing the *Walker* formulation of a prima facie case), Walthour v. Rayonier, Inc., No. CV204-133, 2005 WL 3272459, at *2 (S.D. Ga. Nov. 30, 2005) (citing the *Walker* formulation), Milledge v. Rayonier, Inc., No. Civ.A. CV204-133, 2005 WL 2838139, at *3 (S.D. Ga. Oct. 27, 2005) (citing the *Walker* formulation), Johnson v. Ala. Dep't of Transp., No. 2:04-CV-933-F, 2005 WL 2456009, at *6 (M.D. Ala. Oct. 5, 2005) (citing the *McDonnell Douglas* formulation), Dalmau v. Vicao Aerea Rio-Grandense, S.A., 337 F. Supp. 2d 1299, 1306 (S.D. Fla. 2004) (citing the *Walker* formulation), Phillips v. Hibbett Sporting Goods, Inc., 329 F. Supp. 2d 1280, 1289 (M.D. Ala. 2004) (citing to *Walker*), Gaddis v. Russell Corp., 242 F. Supp. 2d 1123, 1135 (M.D. Ala. 2003) (citing the *Walker* formulation); Bernstein v. Sephora, 182 F. Supp. 2d 1214, 1220 (S.D. Fla. 2002) (noting that "the Eleventh Circuit precedent

Thus, notwithstanding the *Walker* holding declaring *Crawford* the prevailing rule, the *Perryman* requirement has not been altogether abandoned at either the court of appeals or district court level.

IV. RELATIVE QUALIFICATIONS: WHERE DO THEY BELONG?

Having identified and discussed the intra-circuit split, the time is ripe to address what role relative qualifications *ought* to play in a case alleging discriminatory failure-to-promote. Should the plaintiff be required to prove relative qualifications in order to make out a prima facie case, as the Eleventh Circuit often requires? Or, is it better to allow the defendant-employer the opportunity to present proof of relative qualifications as a legitimate, nondiscriminatory reason for the promotion decision? Or, is it better yet to allow the plaintiff the option of presenting such evidence in attempting to prove pretext after the defendant articulates its legitimate, nondiscriminatory reason? Before addressing these questions and ultimately reaching a conclusion as to the proper role of relative qualifications in promotion discrimination cases, it is worthwhile to survey the various approaches of the other circuits. Although it is evident that many of the other circuits have also failed to consistently adhere to a single rule, the variety of approaches nonetheless serves to illustrate the spectrum of possibilities.[83]

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on point is not a model of consistency" and agreeing with plaintiff that the *Walker* formulation controls), *and* Miller v. Bed, Bath, & Beyond, Inc., 185 F. Supp. 2d 1253, 1267 n.14 (N.D. Ala. 2002) (citing to *Walker* and noting that "an Eleventh Circuit panel has squarely held, after an exhaustive review of circuit precedent, that a plaintiff seeking to establish a prima facie case of discriminatory failure-to-promote is not required to show, as part of her prima facie case, that her qualifications are equal or superior to those of the successful applicant" and "[l]anguage to the contrary in subsequent panel decisions appears to be dicta, but even if it is not, such decisions cannot overturn *Walker*'s express holding on point, pursuant to the 'prior panel' precedent rule governing in this circuit"), *with* Tillman v. City of Ocala, No. 504CV219OC10GRJ, 2005 WL 2346951, at *7 (M.D. Fla. Sept. 26, 2005) (requiring plaintiff to show that other equally or less qualified employees not belonging to his race were hired), James v. Montgomery Reg'l Airport Auth., No. Civ.A. 204CV1122TWO, 2005 WL 2250844, at *3 (M.D. Ala. Sept. 15, 2005) (evidencing a cursory reading of *Walker* by quoting, out of context, the portion of the opinion stating that a plaintiff must show that "other equally or less qualified employees who were not members of the protected class were promoted"—a requirement that, upon a careful reading of *Walker*, is clearly repudiated), Caputo-Conyers v. Berkshire Realty Holdings, LP, No. 6:05CV341ORL31KRS, 2005 WL 1862697, at *3 n.6 (M.D. Fla. Aug. 2, 2005) (requiring plaintiff to show that other equally or less qualified employees not belonging to the protected minority were promoted), Ren v. Univ. of Cent. Fla. Bd. of Trs., 390 F. Supp. 2d 1223, 1229 (M.D. Fla. 2005) (requiring plaintiff to show that other equally or less qualified employees not belonging to the protected minority were promoted), Labady v. Gemini Air Cargo, Inc., 350 F. Supp. 2d 1002, 1011 (S.D. Fla. 2004) (requiring plaintiff to show that other equally or less qualified employees not belonging to the protected class were promoted), *and* Caruso v. City of Cocoa, 260 F. Supp. 2d 1191, 1214 (M.D. Fla. 2003) (requiring plaintiff to show that other equally or less qualified employees not belonging to the protected class were promoted).

83. This survey of the circuits is not intended to be exhaustive of all available approaches.

A. *The Other Circuits: Various Approaches to the Issue*

While some courts have required the plaintiff to demonstrate equal or superior relative qualifications in a manner essentially analogous to the *Perryman* rule,[84] several other courts have utilized different approaches. The Fourth, Fifth, Seventh, and Eighth Circuits have required proof of relative qualifications in the failure-to-promote context, but not necessarily as an element of the plaintiff's prima facie case.[85] For example, in *Evans v. Technologies Applications & Service Co.*,[86] the Fourth Circuit only required the plaintiff to show (in order to establish a prima facie case) that she was rejected under circumstances giving rise to an inference of unlawful discrimination.[87] But, in the pretext stage, the court required the plaintiff to present evidence of relative qualifications in order to counter the defendant's proffered legitimate, nondiscriminatory reason.[88] In *Lyoch v. Anheuser-Busch Cos.*,[89] the Eighth Circuit, while asking for proof of relative qualifications at stage one,[90] only required the plaintiff to show that other *similarly* qualified employees outside the protected group were promoted at the time the plaintiff's request for promotion was denied.[91] Similarly, in *Brill v. Lante Corp.*,[92] the Seventh Circuit required the plaintiff to demonstrate at stage one that the promoted employee had *similar or lesser* qualifications for the job.[93] Clearly, as these cases illustrate, proof of relative qualifications can be required in a variety of ways and at various times in the burden-shifting framework.

Rather, the approaches noted in the text are merely meant to illustrate the variety of possibilities, and to give the reader a taste of alternatives.

84. *See, e.g.*, Robbins v. Lucky Stores, Inc., 2000 WL 1703501, at *2 (9th Cir. Nov. 14, 2000) (holding that plaintiffs failed to establish a prima facie case because they had not demonstrated that the promoted employees were equally or less qualified); Payne v. Milwaukee County, 146 F.3d 430, 434 (7th Cir. 1998) (requiring proof that "the employee promoted was not more qualified than [the plaintiff]").

85. *See, e.g.*, Haynes v. Penzoil Co., 207 F.3d 296, 300 (5th Cir. 2000); Pafford v. Herman, 148 F.3d 658, 669-70 (7th Cir. 1998); Lyoch v. Anheuser-Busch Cos., 139 F.3d 612, 614 (8th Cir. 1998); Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959-60 (4th Cir. 1996).

86. 80 F.3d 954.

87. *Id.* at 959-60.

88. *Id.* at 960.

89. 139 F.3d 612 (8th Cir. 1998).

90. The reference to "stage one" simply reflects the fact that a plaintiff, under the *McDonnell Douglas* framework, initially has the burden of establishing a prima facie case. Then, in stage two, the defendant-employer has the burden of articulating a legitimate, non-discriminatory reason for the employment decision. Finally, in stage three, the plaintiff bears the burden of demonstrating pretext and, ultimately, proving intentional illegal discrimination. Thus, in the remainder of this comment, references to stages one, two, or three are meant to correspond accordingly with the stages of the *McDonnell Douglas* burden-shifting framework.

91. *Lyoch*, 139 F.3d at 614.

92. 119 F.3d 1266, 1270 (7th Cir. 1997).

93. *Id.* at 1270.

On the other hand, some courts have not required *any* showing of relative qualifications. For example, in *Howley v. Town of Stratford*,[94] the Second Circuit insisted only that the plaintiff demonstrate that "the denial occurred under circumstances giving rise to an inference of discrimination on a basis forbidden by Title VII."[95] And, in *Cruz v. Coach Stores, Inc.*,[96] the Second Circuit required the plaintiff to show that her job performance was satisfactory, but did not require any evidence of relative qualifications.[97]

B. *Resolution: The Proper Role of Relative Qualifications*

While the examples above illustrate that the issue of relative qualifications can be handled in a variety of ways in the failure-to-promote context, they fail to directly answer the ultimate question—i.e., whether a plaintiff *should* be required to present evidence of relative qualifications, particularly as an element of the prima facie case. To answer this question, one must carefully examine Supreme Court precedent to uncover the subtle guidance contained therein.

As discussed above, the Supreme Court first had occasion to lay out the elements of the prima facie case in *McDonnell Douglas Corp. v. Green*.[98] Therein, the Court stated that a plaintiff could establish a prima facie case of race discrimination by showing (1) that he belongs to a racial minority, (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that despite his qualifications, he was rejected, and (4) that after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications.[99] In a footnote, the Court stated that circumstances will necessarily vary from case-to-case, and that the elements of the prima facie case from *McDonnell Douglas* are "not necessarily applicable in every respect to differing factual situations."[100] It appears from the footnote that the Court intended to give the lower courts a degree of leeway to formulate the elements of the prima facie case, depending upon the type of discrimination involved. For example, in articulating that the plaintiff must show that he belongs to a racial minority, the Court did not intend to prevent a victim of sex discrimination from establishing a prima facie case, merely because she is unable to demonstrate that she belongs to a racial minority. The term "racial

94. 217 F.3d 141 (2d Cir. 2000).
95. *Id.* at 150.
96. 202 F.3d 560 (2d Cir. 2000).
97. *Id.* at 565.
98. 411 U.S. 792 (1973).
99. *Id.* at 802.
100. *Id.* at 802 n.13.

minority" is itself somewhat misleading because Title VII bars discrimination in employment *because of* an individual's race, color, sex, or national origin.[101] While the statute does indeed cover racial discrimination against individuals belonging to a racial minority, it just as equally applies to discrimination *because of* race against individuals of racial majorities. In light of the Court's footnote, lower courts have interpreted *McDonnell Douglas* as merely requiring a plaintiff to show that he or she belongs to a protected group. While it is clear that the requirements of the prima facie case were not intended to be "inflexible,"[102] the courts that have demanded proof of relative qualifications at stage one have gone too far.

Since *McDonnell Douglas*, the Supreme Court has, on a number of occasions, attempted to clarify the burden-shifting framework, most notably in *Texas Department of Community Affairs v. Burdine*.[103] In *Burdine*, the plaintiff had applied for a promotion to a supervisory position with the defendant's Public Service Careers Division (PSC).[104] Due to internal inefficiencies at PSC (including overstaffing and lack of communication among staff), the post remained unfilled for six months, despite the plaintiff's application.[105] Then, the defendant's executive director filled the supervisory position with a male from another division of the agency.[106] The plaintiff was fired along with two other employees, while another male, Walz, was retained as the only professional employee at PSC.[107] Although the defendant ultimately rehired the plaintiff and assigned her to a different division, the plaintiff filed suit based on the prior promotion and termination decisions, alleging gender discrimination in violation of Title VII.[108] After a bench trial, the district court found for the defendant on both claims, concluding that the burden of articulating legitimate, nondiscriminatory reasons for the employment decisions had been satisfied.[109] While affirming the district court with respect to the failure-to-promote claim, the Fifth Circuit reversed on the termination claim, finding that the defendant had not proved its nondiscriminatory reasons by a preponderance of the evidence.[110]

On appeal to the Supreme Court, the question presented was

101. *See* 42 U.S.C. § 2000e-2 (2000).
102. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978).
103. 450 U.S. 248 (1981).
104. *Id.* at 250.
105. *Id.*
106. *Id.* at 251.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 251-52.

whether the defendant had to prove its legitimate, nondiscriminatory reasons by a preponderance of the evidence in order to succeed in rebutting the plaintiff's prima facie case.[111] The Court answered this question in the negative, stating that the defendant's burden was one of production, not persuasion.[112] According to the Court, in order to rebut the plaintiff's prima facie case, the defendant need only introduce admissible evidence outlining the legitimate reasons for the plaintiff's rejection.[113]

The various stages of the *Burdine* case suggest that the plaintiff should not be forced to present proof of relative qualifications. Notably, the district court did not require the plaintiff to prove relative qualifications in order to establish a prima facie case of promotion discrimination in the first instance.[114] Nor did the Fifth Circuit's specification of a prima facie case of promotion discrimination include proof of relative qualifications.[115] Instead, Fifth Circuit precedent placed this burden squarely on the defendant in the rebuttal stage.[116] When the case

111. *Id.* at 250.

112. *Id.* at 259-60.

113. *Id.* at 254.

114. Tex. Dep't of Cmty. Affairs v. Burdine, No A-74-CA-238, 1976 WL 13364 (W.D. Tex. 1976). The district court's opinion does not mention the *McDonnell Douglas* framework, nor does it articulate the specific elements of the prima facie case. But, one can deduce that the plaintiff was not required to demonstrate relative qualifications at stage one. The court, in concluding that the plaintiff had not proved her promotion discrimination claim, stated that the defendant had raised the issue of relative qualifications as its justification for not promoting the plaintiff. *See id.* ("Mr. Fuller testified that the employment decision with regard to the reorganization and its related promotion, transfer and terminations were made on the basis of his evaluations and the recommendations of others concerning the relative qualifications of the individuals involved and what would be best for the PSC program."). The issue, then, was whether the defendant's proffered reason was pretextual, and the court concluded that it was not. *See id.* ("This Court can find no evidence that indicates that the decision not to give the Plaintiff a position in the reorganized PSC division was based on any sexual discrimination. The Court finds that these decisions were based on a good faith, rational evaluation of the relative qualifications of the parties in question and what would be in the best interest of the PSC program."). This reading of the district court's opinion is borne out by the subsequent opinion of the Supreme Court, wherein the Court was concerned with the nature of the defendant's burden in stage two, not with the burden on the plaintiff in stage one. *See Burdine*, 450 U.S. at 257 ("We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.").

115. Tex. Dep't of Cmty. Affairs v. Burdine, 608 F.2d 563, 566 (5th Cir. 1979) ("In order to establish a prima facie case, plaintiff must show that (1) she belongs to a group protected by Title VII, (2) she applied for and was qualified for a job for which the employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after her rejection the position remained open and the employer continued to seek applicants among person's having plaintiff's qualifications.").

116. *Id.* at 567 (stating that the defendant must prove that the persons hired or promoted were

reached the high court, the Supreme Court did not require the plaintiff to prove relative qualifications in order to make out a prima facie case. While the Court did not have occasion to consider the failure-to-promote claim affirmed below, it appears to have lumped the promotion and termination claims together in determining whether the plaintiff had established a prima facie case of sex discrimination:

> In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision.[117]

Regardless, nowhere in the Court's articulation of the plaintiff's prima facie case does one find proof of relative qualifications. The Court, noting that the burden of establishing a prima facie case is "not onerous," merely required that the plaintiff prove by a preponderance of the evidence that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."[118]

Eight years after deciding *Burdine*, the Court again found itself refining and explaining the *McDonnell Douglas* framework in the case of *Patterson v. McLean Credit Union*.[119] In *Patterson*, the plaintiff, an

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somehow better qualified than was the plaintiff). On appeal, the Supreme Court found this requirement to be erroneous because it would require employers to choose the minority or female candidate whenever such a candidate's objective qualifications were not exceeded by those of the non-minority or male applicant. *See Burdine*, 450 U.S. at 259 (stating that Title VII does not demand that employers give preferential treatment to minorities or women). Interestingly, the Supreme Court concludes that "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Id.* at 249. In support of this assertion the Court cites to the portion of *McDonnell Douglas* dealing with the plaintiff's burden in the *pretext* stage (NOT the *prima facie case* stage). *Id.* at 258 (citing *McDonnell Douglas*, 411 U.S. at 804). The Court was later required to revisit the nature of the plaintiff's burden at the pretext stage in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), discussed *infra*.

117. *Burdine*, 450 U.S. at 253 n.6. The Court's mention of Walz, the male employee who was retained at PSC after the plaintiff was terminated, appears to reference the plaintiff's termination claim, which was before the Court on appeal. But, the Court also notes that the plaintiff sought an available position that was left open for several months before she was finally rejected. This reference squarely matches the facts surrounding the failure-to-promote claim. It is unclear whether this "lumping" was the result of sloppiness, given that the prima facie case was not really at issue.

118. *Id.* at 253.

119. 491 U.S. 164 (1989). In *Patterson*, the Court also addressed the coverage of 42 U.S.C. § 1981, concluding that the statute only applies to conduct at the initial making of the contract and conduct which impairs the right to enforce contractual obligations through legal process. *Id.* at 176 ("Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts."). This portion of *Patterson* dealing with the reach of § 1981 was subsequently overruled by Congress in the Civil Rights Act of 1991.

African-American woman, worked as a teller and file coordinator for the defendant credit union.[120] After approximately ten years of service, she was laid off.[121] In response to her termination, the plaintiff filed suit in federal district court against the defendant employer under § 1981, alleging that she had been harassed on the job, denied a promotion, and terminated solely as a consequence of her race.[122] With respect to the failure-to-promote claim central to this comment, judgment was entered in favor of the defendant following a jury trial.[123]

The plaintiff subsequently appealed to the Fourth Circuit, arguing, inter alia, that the district court had erred by instructing the jury that the plaintiff was required to show that she was better qualified than the promoted employee in order to prevail on her promotion discrimination claim.[124] The Fourth Circuit concluded that the instruction was proper because once the defendant employer raised relative qualifications as its legitimate, nondiscriminatory reason for the promotion decision, the burden to show pretext and intentional discrimination shifted to the plaintiff.[125] The court reasoned that, in order to satisfy this burden, the plaintiff was required to prove her superior qualifications and, thus, the district court had not erred by so instructing the jury.[126]

On appeal to the Supreme Court, the plaintiff again raised the issue of whether the jury had been properly instructed.[127] With respect to the prima facie case, the Court stated that:

> [P]etitioner [employee] need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent [employer] either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee.[128]

As with *Burdine*, the Court's formulation of the prima facie case does not require the plaintiff to demonstrate relative qualifications. In *Patterson*, this is particularly telling because the very issue before the Court—whether the district court erred in instructing the jury that the plaintiff was required to show that she was better qualified than the promoted employee—pertains to the plaintiff's burden regarding proof of relative qualifications. At trial, the plaintiff had established a prima facie case without proof of relative qualifications. Then, the defendant asserted

120. *Id.* at 169.
121. *Id.*
122. *Id.*
123. *Id.* at 170.
124. Patterson v. McLean Credit Union, 805 F.2d 1143, 1147 (4th Cir. 1986).
125. *Id.*
126. *Id.* at 1147-48.
127. *Patterson*, 491 U.S. at 170-71.
128. *Id.* at 186-87.

that the promoted employee was better qualified than the plaintiff.[129] The question before the Court was whether, in the third stage, the plaintiff must demonstrate the superiority of her own qualifications in order to prevail. No such requirement was imposed upon the plaintiff at stage one by the district court, and the Supreme Court's articulation of the elements of the prima facie case confirm that no such requirement *should* have been imposed at the initial stage.

Nevertheless, the question remained as to whether proof of relative qualifications was appropriately imposed on the plaintiff at the pretext stage of the proceedings. After the plaintiff's prima facie case was established, the defendant rebutted the presumption of discrimination by articulating that the job was given to the white employee on account of her superior qualifications relative to the plaintiff.[130] Thus, the burden shifted to the plaintiff to demonstrate that the proffered reason was pretext, and that unlawful discrimination was the real reason for the employment decision.[131] By instructing the jury that the plaintiff was required to prove that her own qualifications were, in fact, superior to those of the white employee, the district court misapprehended the nature of the plaintiff's burden. In the Court's view, the jury instruction at issue was improper because it required the plaintiff's proof of pretext to take a certain form.[132] As the Court put it, "[P]etitioner is not limited to presenting evidence of a certain type."[133] The plaintiff may not be forced to pursue any particular avenue of proving pretext, because pretext can be shown in a variety of ways.[134] For example, the Court noted that the plaintiff might point to the way in which the defendant employer had treated her in the past.[135] Alternatively, although not mentioned by the Court, the plaintiff could demonstrate that relative qualifications had not been an important factor in prior promotion decisions by the employer. If, for example, the employer had a practice of promoting the employee with the most seniority, regardless of the relative qualifications of the applicants, then the plaintiff could point to that practice in an attempt to show pretext. In *McDonnell Douglas*, the Court, in explaining the pretext stage of the framework, stated that an employer's overall policy and practice with respect to minority employment might be rele-

129. *Id.* at 187.

130. *Id.*

131. *See id.*

132. *See id.*

133. *Id.* According to the Court, in order to prevail, the plaintiff need only demonstrate that the defendant's proffered reason was not its true reason for making the employment decision. *See id.*

134. *See id.*

135. *Id.* at 188.

vant to a determination of pretext.[136] The point is simply that there is no set formula for proving pretext. As the Court stated in *Burdine*, the plaintiff may succeed in the pretext phase "either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[137]

If it is clear that a plaintiff may never be forced to demonstrate relative qualifications in the pretext phase (although such a showing would certainly be permitted), it ought to be equally clear that no such showing should be required of the plaintiff initially, where the burden is decidedly "not onerous."[138] According to casebook authors Zimmer, Sullivan, and White:

> It is obvious that defendant can put into evidence the superior qualifications of the person promoted in its rebuttal case, but it will not need to do so if plaintiff must prove her qualifications are equal or superior in order to establish a prima facie case. . . . The Court [in *Patterson*] takes a minimalist approach: "[P]etitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee." *Thus, to carry her initial burden, plaintiff need not demonstrate that she was even as well qualified as her white competitor.* The partial dissent of Justices Brennan and Stevens agreed on this point. At the prima facie stage, "[w]e have required . . . proof only that a plaintiff was qualified for the position she sought, not proof that she was better qualified than other applicants."[139]

Because the plaintiff's initial burden is quite minimal, the door is left open for her to proffer a variety of additional forms of evidence in response to claims put forth by the defendant in stage two.

Moreover, the Supreme Court has said that "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'"[140] In *O'Connor v. Consolidated Coin Cater-*

136. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). Presumably, the plaintiff would most likely present statistical evidence of the employer's hiring or promotion practices with respect to minorities, although evidence of a formal policy or practice of excluding minorities would no doubt suffice as well.

137. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (citing *McDonnell Douglas*, 411 U.S. at 804-05).

138. *See id.* at 253.

139. *See* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 124 n.2 (6th ed. 2003) (emphasis added).

140. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-12 (1996) (quoting *Burdine*, 450 U.S. at 254 n.7).

ers Corp.,[141] the Court confronted the question of whether a fifty-six year old plaintiff could establish a prima facie case of age discrimination when the person who replaced him was also over the age of forty, and thus within the protected class under the Age Discrimination in Employment Act.[142] Given that the Act prohibits discrimination *because of* an individual's age,[143] the Court concluded that it would be improper to require a plaintiff to establish that the replacement employee was outside the protected class in order to make out a prima facie case of age discrimination.[144] Discrimination *because of* a person's age can still occur even though the replacement employee is also within the protected class. As the Court observed, "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."[145]

The Court's reasoning in *O'Connor* is relevant to the question of whether there ought to be a relative qualifications requirement in the failure-to-promote context. If each element of the prima facie case is required to bear a logical connection to the discrimination complained of, then a plaintiff should never be required to establish superior relative qualifications in attempting to make out a prima facie case. Title VII prohibits discrimination in employment *because of* an individual's race, color, religion, sex, or national origin. It is conceivable that an individual might be passed over for a promotion *because of* race, color, religion, sex, or national origin even though the employer ultimately promoted an employee who was relatively more qualified. Thus, the fact that one employee loses out to a relatively more qualified employee is irrelevant (i.e., does not legally preclude a finding of discrimination), so long as the first employee has lost out *because of* race, color, religion, sex, or national origin. To be sure, the fact that an employee more quali-

141. 517 U.S. 308.

142. *Id.* at 309.

143. The Age Discrimination in Employment Act provides, inter alia:

> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (2000).

144. *O'Connor*, 517 U.S. at 311-12.

145. *Id.* at 312.

fied than the plaintiff was chosen does tend to negate a finding of unlawful discrimination. But, as the Court stated in *Furnco Construction Corp. v. Waters*,[146] "The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"[147] For this reason, requiring a plaintiff to prove relative qualifications in order to make out a prima facie case of promotion discrimination is inappropriate. Such a requirement would in effect "weed out" some legitimate claims of discrimination, particularly those claims arising out of a situation where the employer does in fact illegally discriminate against the plaintiff, but attempts to cover his tracks by promoting a relatively more qualified candidate.

In *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*,[148] Professor Anne Lawton argues that requiring a plaintiff to prove relative qualifications, especially clearly-superior relative qualifications, is improper because it reduces the number of cases submitted to the fact-finder for a determination regarding the alleged unlawful discrimination:

> The problem with this requirement is that it is very difficult for plaintiffs to demonstrate that they are more qualified than the candidate selected by the employer. Employers normally hire and promote on the basis of multiple criteria. As a result, an employer can always point to at least one criterion, which it claims is critical to the position, on which the plaintiff is weaker than the candidate selected. Requiring plaintiffs to prove clearly-superior qualifications, especially on motions for summary judgment, significantly reduces the number of cases that will proceed to trial.[149]

This critique alludes to the inequality that exists between plaintiff-employee and employer.[150] An employer is permitted to use multiple

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146. 438 U.S. 567 (1978).

147. *Id.* at 577 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

148. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587 (2000).

149. *Id.* at 645 (footnote omitted).

150. Recently, due to this inequality between employer and employee, the Eleventh Circuit rejected an argument that the plaintiff should be required to demonstrate, in order to make out a prima facie case, that he satisfied the employer's objective, as well as *subjective* criteria for the job in question. *See* Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 768-69 (11th Cir. 2005). In rejecting the argument, the court reasoned:

> [T]o demonstrate that he was qualified for the position, a Title VII plaintiff need only show that he or she satisfied an employer's objective qualifications. The employer may then introduce its subjective evaluations of the plaintiff at the later stages of the *McDonnell Douglas* framework. A contrary rule, under which an employer's subjective evaluation could defeat the plaintiff's initial prima facie case, cannot be squared with the structure and purpose of the *McDonnell Douglas*

criteria (including subjective criterion) when making employment decisions, and oftentimes an employee denied a promotion may not be capable of identifying the key criteria from the employer's perspective. This makes it very difficult for an aggrieved employee to demonstrate the superiority of his qualifications. And, as Lawton notes, the employer can almost always point to at least one allegedly-critical criterion on which the plaintiff is inferior to the promoted employee. Because courts are generally not permitted to interfere with the business judgment of an employer,[151] there is little a plaintiff can do when his employer utilizes such a tactic. Therefore, just as a plaintiff should not be required to demonstrate superior relative qualifications at the prima facie case stage, the success of the plaintiff's case should not depend on a battle with the employer in the pretext stage concerning which promotion criteria are the most important. In such a situation, the *McDonnell Douglas* framework "tends to discourage the kind of holistic fact finding that is most likely to reveal the truth about discrimination in the workplace."[152]

Thus, it is essential that courts and fact-finders remember that the ultimate question in any employment discrimination case is always whether one person has been treated less favorably than others *because of* a class characteristic upon which an employer may not legally dis-

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framework. *Specifically, we have made clear that the prima facie case is designed to include only evidence that is objectively verifiable and either easily obtainable or within the plaintiff's possession. This permits the plaintiff who lacks direct evidence of invidious intent to force the employer to articulate its motives for the challenged employment action so that the plaintiff has an opportunity to show intentional discrimination by circumstantial evidence.* If we were to hold an employer's subjective evaluations sufficient to defeat the prima facie case, the court's inquiry would end, and plaintiff would be given no opportunity to demonstrate that the subjective evaluation was pretextual. Such a blind acceptance of subjective evaluations is at odds with the intent that underlies the *McDonnell Douglas* framework. This is particularly important because we have emphasized that subjective criteria can be a ready vehicle for race-based decisions. Furthermore, we cannot reconcile a rule that would essentially require a plaintiff to prove pretext as part of his prima facie case at the summary judgment stage with the Supreme Court's instruction that the plaintiff's prima facie burden is not onerous. Thus, subjective evaluations play no part in the plaintiff's prima facie case. Rather, they are properly articulated as part of the employer's burden to produce a legitimate race-neutral basis for its decision, then subsequently evaluated as part of the court's pretext inquiry.

Id. at 769 (emphasis added) (citations omitted). The court's reasoning is equally as relevant to whether a plaintiff ought to bear the burden of demonstrating relative qualifications in order to establish a prima facie case.

151. *See Furnco Constr. Corp.*, 438 U.S. at 578 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

152. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2237 (1995) (reviewing the use of the burden-shifting framework by district courts at the pretrial stage).

criminate. Since, as discussed above, it is possible for an employer to illegally discriminate even though the "superiorly" qualified candidate was chosen, the issue of relative qualifications should never be viewed as outcome-determinative. Evidence of relative qualifications, of course, may be probative of whether discrimination has occurred. But, the question to be answered should always be whether unlawful discrimination has occurred in light of all of the evidence. Courts and juries should view evidence of relative qualifications alongside all of the other evidence in a given case such that a conclusion may be reached on the basis of "holistic fact finding."

Professor Kenneth R. Davis has suggested that this "holistic fact finding" is not possible under the confines of the *McDonnell Douglas* framework, and, as a result, the framework should be abandoned.[153] According to Davis, "A system with flaws so pervasive and serious eludes even the most laborious efforts at repair."[154] He argues that the framework erects "artificial evidentiary barriers" at each stage in the framework, which in effect prevent the parties from presenting their cases in the manner of their choosing.[155] Under the Civil Rights Act of 1991, which amended Title VII, a plaintiff need only prove that unlawful discrimination was a factor motivating the adverse employment decision.[156] Davis contends that the *McDonnell Douglas* framework conflicts with the 1991 Act in requiring, among other things, that the plaintiff establish a prima facie case.[157] In his view, so long as a plaintiff is capable of demonstrating that at least some part of the employer's decision was based upon an unlawful discriminatory motive, whether a plaintiff has made out a prima facie case is irrelevant.[158] Therefore, Davis advocates leaving the burden-shifting framework of *McDonnell Douglas* behind and adopting the traditional practices of civil litigation for all cases of disparate treatment discrimination:

> Such practices allow for adducing proof of pretext. Plaintiff's attorney, on cross-examination, might ask the defendant or its responsible agent why he made the contested employment decision. If the party who made the employment decision does not otherwise testify, the plaintiff could call him as a hostile witness. Having elicited the

153. *See* Kenneth R. Davis, *The Stumbling Three-Step Burden Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 761 (1995).

154. *Id.*

155. *Id.* at 744.

156. *See* 42 U.S.C. § 2000e-2(m) (2000) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." (emphasis added)).

157. Davis, *supra* note 153, at 751.

158. *See id.*

> alleged reason for the challenged action, the plaintiff would offer rebuttal evidence. Thus, without the formalism of the *McDonnell Douglas* scheme the plaintiff could present to the finder of fact evidence of pretext. To decide the ultimate issue of discriminatory intent, the jury would weigh this testimony along with all relevant evidence. Proof bearing on the issue of pretext would be before the factfinder. Pretext, however, would not receive undue emphasis and would not necessarily be the determining factor at trial.[159]

Since a holistic approach is more likely to properly include legitimate cases of discrimination and properly exclude unsupported claims, Davis' argument certainly has appeal.[160] With respect to the type of

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159. *Id.* at 752-53.

160. Others have quarreled with the wisdom and usefulness of the *McDonnell Douglas* framework as well. Professor Jeffery A. Van Detta has written:

> [The *McDonnell Douglas*] framework led to an incredible volume of controversies. It continued to plague the Supreme Court with its problematic nature for almost thirty years after its birth. To keep it alive, the Supreme Court was forced to revisit and repair it in a litany of cases (quite familiar to employment discrimination lawyers and law students). In the process of this germinating litany, *McDonnell Douglas* also became a legal liturgy. Some courts referred to *McDonnell Douglas* as a "minuet," a mechanical mantra that often obscured the underlying substance of the issues raised by the plaintiff's factual contentions. Well-versed plaintiffs' lawyers have advised their brethren that a "major premise" of a winning strategy is to "avoid being confined solely to the *McDonnell Douglas* model of proof if at all possible."
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> . . . .
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> . . . In *McDonnell Douglas*, the Supreme Court did not address why it simply ignored [the Eighth Circuit's] formulation of the classic tort-type burden of proof and instead offered a burden-shifting scheme, nor why it came up with this framework, nor why it let the employer off so lightly by requiring nothing more than a mere articulation of "some legitimate, nondiscriminatory reason" for its action. Indeed, Justice Powell's peculiar phrasing [in *McDonnell Douglas*]—"some . . . reason"—makes it appear as if the employer must simply place its hand on its hip, chin in hand, inventory possible excuses for a discriminatory decision, and throw one out to see if it will stick. . . . [T]he very minuet whose tune was first called in *McDonnell Douglas* assured that a good deal of racial discrimination, both subtle and otherwise, would escape judicial scrutiny. Although *Burdine* asserted that "[t]he *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question" of whether "defendant intentionally discriminated against the plaintiff," the history of the tortured minuet suggests that it obfuscates the question of discrimination to the detriment of the plaintiff. *McDonnell Douglas* hardly "eliminates the most common nondiscriminatory reasons for" an adverse employment action, as it was advertised to do. To the contrary, it simply shifts the "elusive factual question of intentional discrimination" down the line—except now the plaintiff has the additional burden to prove not only that the defendant is a discriminator, but also a liar.

Van Detta, *supra* note 1, at 90-92 (footnotes omitted).

In light of such criticism, one might wonder how it is that we ended up with such a framework. Professor Van Detta implies that the *McDonnell Douglas* decision was spurred by the Supreme Court's desire to remedy the lack of uniformity among the lower courts in Title VII

case at issue in this comment—the failure-to-promote case—one way around the onerous relative qualifications requirement is to simply do away with the burden-shifting framework altogether. But, one need not buy into Davis' arguably radical solution in order to recognize the foundational truths in his analysis.

Davis contends that the courts, in requiring every plaintiff to prove a prima facie case, have "doomed otherwise valid discrimination claims."[161] This is true, he argues, because plaintiffs have been strictly forced to prove each element of the prima facie case in order for the case to proceed to the next phase.[162] If a plaintiff cannot satisfy one or more elements of the prima facie case, then the defendant-employer is entitled to judgment as a matter of law. In such a situation, the court must grant summary judgment notwithstanding the possibility that unlawful discrimination may have actually motivated the employment decision. In such a case, an otherwise valid discrimination claim is defeated at the courthouse door merely because the plaintiff was incapable of satisfying the technicalities of the prima facie case.

For example, as Davis explains, in a case of discriminatory discharge or demotion, a plaintiff is required to prove that the employer attempted to replace the terminated or demoted employee.[163] But, whether the employer decided to seek a replacement or not has nothing to do with whether the employer acted unlawfully with respect to the aggrieved employee.[164] Nevertheless, where the plaintiff cannot show that the employer sought a replacement, he cannot make out a prima

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cases. *See id.* at 86-87; *see also* Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 385 (2004) ("The Court decided to undertake [*McDonnell Douglas*] because of the 'notable lack of harmony' in the opinions of the lower courts regarding the allocation of burdens. Accordingly, it set out the now famous three-part framework under which employees may prove disparate treatment discrimination." (footnotes omitted)).

Professor William R. Corbett explains that the *McDonnell Douglas* framework was created to *aid* plaintiffs in proving discrimination:

> In 1973, in the second Title VII case to reach the U.S. Supreme Court—*McDonnell Douglas*—the Court recognized how difficult it is for plaintiffs to present evidence of discrimination "because of [their] race, color, religion, sex, or national origin." Accordingly, the Court created a proof structure (or analysis or framework, if you prefer) to be used in evaluating intentional discrimination cases. Justice O'Connor would later explain that the shadow was created to aid plaintiffs, who seldom have the benefit of direct evidence, in the presentation of their evidence of discrimination.

William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1555 (2005) (footnotes omitted). Whether the framework has actually benefited plaintiffs is a complicated question. Perhaps the best answer is found in Professor Van Detta's characterization of the "'prima facie case' concept" as "a double-edged sword." *See* Van Detta, *supra* note 1, at 74.

161. Davis, *supra* note 153, at 753.

162. *Id.*

163. *Id.* at 756.

164. *See id.*

facie case and, thus, the case will never reach a jury.[165]

Another example offered by Davis involves the requirement that a plaintiff demonstrate objective qualifications—i.e., proof that he was generically qualified for the position sought.[166] This requirement defeats a claim of discrimination where an unqualified employee is rejected for a discriminatory reason.[167] "The potential injustice of such an approach is that, in addition to plaintiff's qualifications, discriminatory intent might have motivated the employer, or, more strikingly, the plaintiff's qualifications may have played only a minor role in influencing an employer's decision motivated primarily by discrimination."[168]

The examples cited by Davis illustrate that the requirements of the prima facie case may, in a given context, result in some legitimate claims of discrimination getting excluded from consideration by the fact-finder. The same holds true of the relative qualifications requirement imposed upon the plaintiff in the failure-to-promote context. Where a plaintiff is incapable of demonstrating that the person actually promoted is inferiorly (or, at minimum, equally) qualified, the plaintiff cannot make out a prima facie case (in the jurisdictions imposing the requirement) and summary judgment must be entered in favor of the defendant-employer. Such a result is inconsistent with the 1991 Act, which mandates only that a plaintiff demonstrate that a particular employment decision was motivated in part by an illegal reason.[169] More fundamentally, the result is at odds with the underlying purpose of Title VII, which represents Congress's desire to eradicate discriminatory decision-making from the workplace. Surely, in enacting Title VII, Congress did not intend for an employee denied promotion because of his race to face defeat at the summary judgment stage due to an inability to prove relative qualifications. If the task of establishing a prima facie case is meant to be "not onerous,"[170] then it is hard to understand why a plaintiff should have to demonstrate that he is, from the point of view of his employer, relatively more qualified than the person actually promoted.

C. *Practical Consequences of Requiring Proof of Relative Qualifications*

Having surveyed the various approaches used by the Eleventh Circuit and other courts, and having discussed the proper role of relative

165. *Id.*
166. *Id.* at 755.
167. *See id.* at 755-56.
168. *Id.* at 756.
169. *See* 42 U.S.C. § 2000e-2(M) (2000).
170. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S 248, 253 (1981).

qualifications from a theoretical standpoint, it is now necessary to consider whether requiring proof of relative qualifications has any practical bearing on the outcome of a given case, lest this entire exercise be rendered academic.

It seems safe to speculate that, in the majority of cases, the outcome will not depend on whether a court has demanded that the plaintiff provide proof of relative qualifications, at least where the requirement only asks the plaintiff to show that she is, compared to the person actually promoted, equally or more qualified. One can imagine a thousand scenarios in which a plaintiff succeeds in establishing a prima facie case only to ultimately lose after the employer claims to have promoted a more able candidate. In these cases, it often makes little difference, practically speaking, whether the plaintiff is deemed to have lost for failing to make out a prima facie case or for being unable to prove that the employer's legitimate, non-discriminatory reason (i.e., that the promoted employee was better qualified) was pretext for intentional discrimination.[171]

If, however, the plaintiff is deemed to have established a prima facie case of promotion discrimination *without* having shown relative qualifications, and the employer's legitimate, nondiscriminatory reason is that a better qualified candidate was chosen, the plaintiff is afforded an *opportunity* to demonstrate pretext. In this respect, not requiring initial proof of relative qualifications by the plaintiff gives her another opportunity to succeed—in essence, a second bite at the apple—even though the employer has identified relative qualifications as the reason for the employment decision. A plaintiff's showing of pretext can be made "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[172] Therefore, if the plaintiff can present evidence that the employer's stated reason is false or that the employment decision was more likely than not

171. Those who believe that the plaintiff will somehow be able to succeed far more easily if only required to address relative qualifications at the pretext stage (assuming the employer has asserted relative qualifications as a legitimate nondiscriminatory reason), should take note of a recent Eleventh Circuit opinion. As that panel decision observed, in order to demonstrate pretext, the plaintiff must show not only that he was, in fact, better qualified than the promoted candidate, but also that the discrepancies in their qualifications were so apparent as to jump off the page. *See* Stuart v. Jefferson County Dep't of Human Res., 152 F. App'x 798, 802 (11th Cir. 2005) ("[The plaintiff] cannot prove pretext merely by baldly asserting that he was better qualified than the person who received the position at issue. Instead, he must proffer evidence that the disparity in qualification was so apparent as virtually to jump off the page and slap you in the face. . . . [The discrepancies] must be of such weight and significance that no reasonable person could have chosen [the promoted candidate] over [the plaintiff]." (citations omitted) (internal quotation marks omitted)).

172. *Burdine*, 450 U.S at 256.

the result of discrimination, the fact-finder is free to conclude that the employment decision was, more likely than not, motivated by an illegal reason, and thus may find in favor of the plaintiff.[173] In situations where a plaintiff cannot demonstrate initially that, from the point of view of the employer, she is equally or more qualified than the promoted employee, but can offer evidence that the employer is lying, the plaintiff's chance of success is greatly bolstered when proof of relative qualifications is not required at the initial stage.[174]

Similarly, in situations where an employer has promoted a superiorly-qualified employee, but nonetheless denied promotion to the plaintiff discriminatorily (i.e., for an illegal reason), the plaintiff will have an increased chance of success if not required to demonstrate relative qualifications at the outset. Under such circumstances, the plaintiff has no chance of proving his case if he is required to show relative qualifications in order to establish a prima facie case because, factually speaking, it is simply untrue that he is more qualified than the promoted individual. By contrast, where proof of relative qualifications is not required, the plaintiff has at least some hope of carrying the day by proffering evidence tending to show that the employer acted unlawfully. While the plaintiff in such a case would, of course, face an uphill climb, it would be inconsistent with Title VII to prevent him from trying to prove his case in a holistic manner—especially where, from an omniscient point of view, we know that unlawful discrimination prompted the employment decision in this hypothetical case.

Finally, the relative qualifications requirement could affect the plaintiff's chance of success in yet another set of circumstances as well. As the Eleventh Circuit recently noted, albeit in dicta, "Difficult as it might be to prove, a promotion could be denied for discriminatory reasons *even though no one outside the protected class was promoted—even though there were no comparators and therefore no prima facie case.*"[175] This could play out in a couple of different ways. In situations

173. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

174. The hypothetical case described here does not necessarily envision a plaintiff-employee who is, in reality, inferiorly qualified as compared to the promoted employee. Rather, it envisions a plaintiff who simply is unable to obtain from her employer the pertinent information indicating how (i.e., by what method and criteria) the qualifications of the employees under consideration were ranked. Because, in such a situation, the employer is the holder of key information, the plaintiff has no choice but to attempt to expose the proffered explanation as false when the reason put forth for the employment decision is relative qualifications. Under such circumstances, a plaintiff's cause is aided greatly when she is not required to prove relative qualifications at the outset.

175. Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1154 (11th Cir. 2005) (emphasis added) (requiring proof of relative qualifications at stage one).

where no one was promoted instead of the plaintiff (i.e., where the employer simply did not fill the position), the plaintiff literally cannot prove that she was more qualified than some other candidate. Nonetheless, the employer's decision to deny the plaintiff's promotion could have been motivated by unlawful discrimination, despite the fact that the position was not subsequently filled with another employee. Notwithstanding this logic, a district court recently held that the plaintiff could not establish a prima facie case because no one else had been promoted (and hence no comparator existed).[176]

Perhaps even worse, defeat may await the plaintiff even though the employer promoted another individual. If the promoted candidate is not from "outside the protected class," the plaintiff's prima facie case may be deemed deficient, as one plaintiff recently discovered.[177] In *Caputo-Conyers v. Berkshire Realty Holdings, LP*,[178] the district court held that the plaintiff could not make out a prima facie case of gender discrimination in part because she did not allege that her employer had promoted an equally or less qualified employee from *outside the protected class*.[179] Such a showing would have been impossible because the employer filled the position with another female.[180] So, what's the problem? How can a woman denied promotion claim gender discrimination when the employer proceeded to hire another woman? In most situations, it seems safe to say, gender discrimination would not have motivated the employment decision. But, in *Caputo-Conyers*, the plaintiff was pregnant, while the promoted female was single and not pregnant.[181] Thus, it is at least possible that the employer discriminated against the plaintiff *because of* her pregnancy, and hence *because of* her sex.[182] Yet, because the court demanded proof that the employer had

176. *See* Labady v. Gemini Air Cargo, Inc., 350 F. Supp. 2d 1002, 1011-12 (S.D. Fla. 2004) ("The undisputed facts reveal that while Defendant interviewed Plaintiff and several other candidates for the General Manager position, it decided not to fill the position due to budget constraints and a reduction in force. Thus, because Plaintiff cannot satisfy the fourth prong of the prima facie test that 'other equally or less qualified employees who were not members of the protected class were promoted,' he is unable to make out a prima facie case of discriminatory failure to promote." (citation omitted)). One should note that *McDonnell Douglas* did not require the plaintiff to show that the sought-after position had been filled; rather, the plaintiff was only asked to demonstrate that the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

177. *See* Caputo-Conyers v. Berkshire Realty Holdings, LP, No. 6:05CV341ORL31KRS, 2005 WL 1862697, at *4 (M.D. Fla. Aug. 2, 2005).

178. 2005 WL 1862697.

179. *See id.* at *4.

180. *See id.* at *4 n.9.

181. *See id.*

182. As the *Caputo-Conyers* court observes, Title VII protects against discrimination on account of pregnancy:

promoted other equally or less qualified employees who were *not members of the protected class*, the plaintiff could not establish a prima facie case.[183] While a plaintiff like Caputo-Conyers might find it difficult to succeed in proving her claim, such a plaintiff should be given an opportunity to demonstrate that her employer behaved discriminatorily; she should not be ushered from the courthouse at such an early stage in the case.

> Congress amended Title VII by enacting the Pregnancy Discrimination Act, which expands the definition of sexual discrimination and states, in relevant part,
>
> > The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.
>
> 42 U.S.C. § 2000e(k). Pregnancy is therefore a protected classification under the statute.

See id. at *4-*5.

183. *See id.* at *4 (noting the plaintiff's failure "to address two of the four elements of a prima facie discrimination claim," and concluding that "her claims in Count 1 of gender discrimination in promotions will be dismissed"). The court subsequently dismissed the plaintiff's claim of pregnancy discrimination "because the Plaintiff [did] not allege in her Complaint that she was treated differently than a non-member of her protected class." *See id.* at *5 ("Specifically, the Plaintiff's Complaint fails to allege that a non-member of the Plaintiff's protected class was promoted in her stead, or that after she was terminated, a non-member replaced her. Therefore, Count 2 will be dismissed."). The court's utter failure to conceive of gender discrimination absent the hiring of a male reflects a misapprehension of Title VII and its underlying purposes. The court's narrow-minded approach is even more startling when one considers the facts of the case:

> BRH hired the Plaintiff in May of 2003 as Assistant Property Manager at the Altamonte Bay Club, a property BRH owns. While she was employed, the Plaintiff performed the duties of her job in a satisfactory manner, received positive performance reviews, and was awarded merit pay increases. In November of 2003, a District Manager approached the Plaintiff and offered her a promotion to the position of Property Manager for the Altamonte Bay Club. During her interview for that promotion, the Plaintiff informed the District Manager that she was pregnant and due to deliver in May of 2004. The Plaintiff also informed the District Manager that she would apply for coverage under the Family and Medical Leave Act for the birth, but that she planned to work up until her due date, unless she was advised otherwise by her physician. After being advised of the Plaintiff's pregnancy, the District Manager withdrew the offer of promotion.
>
> The Plaintiff continued working as Assistant Property Manager until February of 2004, when she applied for, and was approved for, coverage under the Family and Medical Leave Act, after her physician advised her of a serious health condition connected with her pregnancy. While the Plaintiff was on leave, she continued to perform her job duties, received regular paychecks, and accrued vacation and sick time.
>
> In May of 2004, while still on leave, the Plaintiff sought, and was again denied, a promotion to the Property Manager position. She was scheduled to return from leave on June 28, 2004. However, her employment was terminated on June 21, 2004.

See id. at *1 (footnote omitted).

V. CONCLUSION: WHERE TO GO FROM HERE

In sum, we have seen that the federal courts have struggled to identify the proper role of relative qualifications in cases of promotion discrimination under Title VII. This struggle is epitomized by the intra-circuit split of the Eleventh Circuit Court of Appeals discussed above. While the vast majority of courts within the Eleventh Circuit continue to require the plaintiff to demonstrate proof of relative qualifications in order to make out a prima facie case of promotion discrimination, such a showing should not be required. Legally speaking, the prevailing rule within the Eleventh Circuit does not require proof of relative qualifications as an element of the prima facie case. But, regardless of the Circuit's technically-prevailing standard, a much deeper and important question is whether a plaintiff should have to demonstrate relative qualifications, not just at stage one, but at all. As I hope the aforementioned arguments demonstrate, a plaintiff should *never* be required to demonstrate relative qualifications, whether it be at stage one (prima facie case) or stage three (pretext). Such a requirement runs contrary to the congressional intent underlying Title VII, namely that all forms of discrimination within the workplace be eradicated. The fact that the relative qualifications requirement undercuts Congress's goal is clear: If a plaintiff who has been denied promotion for an illegal reason is unable to show that the promoted employee is equally or inferiorly qualified, that plaintiff necessarily must lose, notwithstanding the fact that the employer acted in contravention of Title VII. In this way, the relative qualifications requirement is arbitrary and unfair.

In terms of addressing the problem, there are at least three possible solutions. First, Congress could undertake to amend Title VII, statutorily adopting the *McDonnell Douglas* framework for circumstantial evidence cases of disparate treatment and specifically stating that a plaintiff need only satisfy the basic elements of the prima facie case as articulated in *McDonnell Douglas* itself, regardless of whether a denial of promotion or some other discriminatory type of employment decision is alleged. The second possible solution is derived from the work of Professor Davis: Either Congress or the Supreme Court could explicitly do away with the *McDonnell Douglas* burden-shifting framework in favor of the traditional practices of civil litigation.

While the two suggestions above would undoubtedly eliminate the problem, there is a more modest answer. Either on their own initiative or at the Supreme Court's behest, the federal courts could simply stop requiring proof of relative qualifications (whether at stage one or three) in promotion discrimination cases. Instead, both plaintiff and defendant, while not required to proffer evidence of relative qualifications, would

be permitted to do so. In other words, the relative qualifications requirement would be transformed from a mandatory showing to a discretionary one. While this approach to the problem at hand is least radical, it also happens to be the least likely, given the divergence within the federal circuits. Whatever form the solution takes, it is clear that something must be done about the erroneous relative qualifications requirement in cases of promotion discrimination under Title VII. I am not Einstein, so the perfect solution is not apparent to me, but I am relatively satisfied with my work here, as I subscribe to Kettering's view that "[a] problem well stated is a problem half solved."[184]

EDDIE KIRTLEY*

184. THE BOOK OF POSITIVE QUOTATIONS 506 (John Cook ed., 1993).

* J.D. Candidate 2006, The University of Miami School of Law. I would like to dedicate this comment to my grandparents, Nick and Pat Kafoglis, who, through years of selfless public service, have taught me the importance of civic duty and social justice. I would also like to thank my parents for making the success of their son the sole priority of their lives. You have given me so much and I am eternally grateful. And, finally, a special thank you to Professors Donald Papy, Kenneth Casebeer, and Mark Fajer for the invaluable assistance with this piece.